BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL EMERY Claimant	)	
VS.	)	
OYERLY TRUCKING	)	
AND	)	
SMART TRUCK LINE, INC. Respondents	)	Docket No. **1,032,583**
AND	)	
CONTINENTAL WESTERN INS. CO. Insurance Carrier	)	
AND/OR	)	
WORKERS COMPENSATION FUND	)	

ORDER

Respondent, Smart Truck Line, Inc., and its insurance carrier, Continental Western Insurance Co., request review of the August 12, 2010 Nunc Pro Tunc Award and August 12, 2010 Award by Administrative Law Judge Brad E. Avery. The Division's Acting Director, Seth G. Valerius, on November 23, 2010, appointed E. L. Lee Kinch of Wichita, Kansas, to serve as Board Member Pro Tem in place of Carol Foreman, who retired in September 2010. The Board heard oral argument on December 17, 2010.

APPEARANCES

Dennis L. Horner of Kansas City, Kansas, appeared for the claimant. Nathan D. Burghart of Lawrence, Kansas, appeared for Smart Truck Line, Inc. (Smart) and its insurance carrier. Penny R. Moylan of Topeka, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board the parties stipulated to the Administrative Law Judge's (ALJ) findings that claimant suffered a 40 percent functional impairment and an 80.40 work disability. Consequently, those findings are affirmed.

ISSUES

The claimant, a truck driver, was injured on October 11, 2006 in a vehicular accident. The stipulations in the ALJ's Award indicate respondent admitted the accidental injury arose out of and in the course of employment with respondent and the respondent admitted the relationship of employer and employee on the accident dates. However, at regular hearing the ALJ noted that the respondents raised the issue of who the employer was at the time of the accidental injury. Consequently, an accurate recitation of the stipulation would reflect those issues, especially the relationship of employer and employee, were disputed as each respondent denied claimant was their employee on the date of accident.

As previously noted, the ALJ found claimant suffered a 40 percent functional impairment and awarded claimant compensation for an 80.40 percent work disability based upon a 100 percent wage loss and a 60.80 percent task loss.[1]

The ALJ further determined that claimant was jointly employed by Oyerly Trucking (Oyerly) and Smart. But because claimant's injury arose out of and in the course of job duties assigned by Smart, the ALJ found Smart solely liable for claimant's compensation pursuant to K.S.A. 44-503a.

Smart requests review of the following: (1) whether claimant's accidental injury arose out of and in the course of employment with Smart. Smart argues that claimant was an employee of Oyerly. In the alternative, Smart argues that claimant was a joint employee and because all of his compensation came from Oyerly, the Fund would be liable as Oyerly was uninsured.

The Fund argues that the ALJ's Award should be affirmed as claimant's accidental injury was solely attributable to work he performed for Smart. In the alternative, the Fund argues that claimant was Smart's statutory employee pursuant to K.S.A. 44-503a and because Oyerly, the subcontractor, did not have workers compensation insurance, the principal, Smart, is liable. The Fund also argues in the alternative that claimant was a "special employee" of Smart.

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[1] See K.S.A. 44-510e.

Claimant requests the Board to affirm the ALJ's findings.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Smart is engaged in the business of hauling grain, fertilizer and feed ingredients. Smart owns its own trucks and has its own full-time employees to drive those trucks. Smart also leases trucks and trailers from others to assist in hauling loads for its business. Smart entered into a lease agreement with Charles W. Oyerly to lease a truck and trailer as well as the services of the driver of the equipment.[2] Mr. Oyerly owned the truck and trailer that he leased to Smart. David E. Byers, Smart's owner, testified that Smart received 10 percent of the gross revenue for the loads hauled by Oyerly's equipment and Oyerly received 90 percent.[3] And that Oyerly paid the driver (claimant) from his share of the gross revenue. Mr. Byers further testified that he had a discussion with Oyerly and told him that since Oyerly owned the truck he would have to provide workers compensation insurance for his driver. After the accident it was discovered that Mr. Oyerly did not have workers compensation insurance coverage.

Claimant testified that he became aware of the truck driving job when he saw an ad in the Atchison newspaper. Claimant completed a job application form at the request of Charles Oyerly. The claimant testified that he was hired by Charles Oyerly but the hiring had to be approved by Smart. Claimant had to fax his driving record, driver's license and related documents to Smart. Claimant was later contacted by Mr. Oyerly and offered the job. And claimant stated that Oyerly was his employer at the time of the accident.

Mr. Byers testified that he did not hire claimant and Mr. Oyerly hired his own drivers. But Mr. Byers confirmed that he had to okay the hire. Mr. Byers further noted that he could also fire Oyerly's driver (claimant) if he was not appropriately performing the work. Mr. Byers testified:

> Q. Okay, can you describe in full detail the oral understanding you had with Oyerly regarding the services provided, or your understanding, I guess?
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> A. Charles -- originally when we first set up the lease agreement I informed Charles that if we had any difficulties with any of his drivers I was -- I had the final

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[2] Byers Depo., Ex. 1.

[3] It should be noted that the lease agreement states Oyerly as lessor would receive 80 percent of the gross revenues.

> say-so on whether they were released or whether we kept them on. Same as hiring. I basically had the -- had the right to hire, too.[4]

But Mr. Byers further testified that he had never exercised the right to terminate any of Oyerly's drivers and he had never prevented him from hiring anybody. Interestingly, Mr. Byers did consider the drivers of the trucks he leased the same as he considered his employees. Mr. Byers testified:

> Q. Do you, or did you ever consider Mr. Emery as an employee of Smart Trucking?
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> A. He worked for Smart Truck Line, but his payment was through Charles. I mean, Smart Truck Line didn't ever issue him a check.
>
> Q. Well, let me ask it this way: You have employees of Smart Truck Line?
>
> A. Yes.
>
> Q. Okay. You have other owner-operators that you lease their trucks for?
>
> A. Yes.
>
> Q. Do you consider that they do work for, or do driving for Smart Truck Line under the motor vehicle lease agreement?
>
> A. Yes.
>
> Q. Do you consider them in the same category as the 12 employees or 12 drivers you have?
>
> A. Yes.[5]

The truck claimant drove had lettering on the side which stated Oyerly Trucking leased to Smart Truck Line. In the event an equipment breakdown occurred, claimant would initially call Mr. Byers but then would contact Oyerly. If Byers paid for repairs they would then be deducted from the settlement Oyerly received. Oyerly was also responsible for the maintenance and upkeep of the truck and trailer. Oyerly also provided claimant a credit card to pay for fuel. And claimant was paid his wages by Oyerly. After the accident when claimant decided he could no longer perform the duties of a truck driver, he called Oyerly and resigned.

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[4] Byers Depo. at 62.

[5] *Id*. at 64-65.

The entire time claimant drove Oyerly's truck he only performed work for Smart. Mr. Byers noted that he was in contact with claimant two or three times daily as he was also the dispatcher and directed claimant when and where to pick up loads.

The claimant was hired by Oyerly to operate a tractor trailer unit to haul freight for Smart. The evidence establishes that Oyerly paid claimant as driver for purposes of completing contractual obligations between Oyerly and Smart. At the time of the accident, claimant was driving a tractor trailer unit and hauling goods for Smart. There can be no doubt that Smart's trade or business is to transport grain, fertilizer and feed ingredients from one place to another by tractor trailer unit. There was a lease agreement between Oyerly and Smart to provide a tractor and trailer as well as a driver to haul goods for Smart.

K.S.A. 44-503(a) extends the application of the Workmen's Compensation Act to certain individuals and entities who are not the immediate employers of an injured worker.[6] The purpose of the statute is to give employees of a sub-contractor a remedy against a principal contractor and to prevent employers from evading liability under the act by contracting with outsiders to do work which they have undertaken as a part of their trade or business.[7] The statute provides:

> Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; [8]
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> . . . **In the event that the payment of compensation is not secured or is otherwise unavailable or in effect, then the principal shall be liable for the payment of compensation**.[9] (Emphasis added)

There is a two-part test to determine whether the work which caused the injury is part of the principal's trade or business, *i.e.* (1) is the work being performed by the injured employee necessarily inherent in and an integral part of the principal's trade or business? (2) is the work being performed by the injured employee such as is ordinarily done by

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[6] *Hollingsworth v. Fehrs Equip. Co.*, 240 Kan. 398, 402, 729 P.2d 1214 (1986).

[7] *Bright v. Cargill, Inc.*, 251 Kan. 387, 837 P.2d 348 (1992); *Atwell v. Maxwell Bridge Co.*, 196 Kan. 219, 409 P.2d 994 (1966).

[8] K.S.A. 44-503(a).

[9] K.S.A. 44-503(g).

employees of the principal? If either of the foregoing questions is answered in the affirmative the work being done is part of the principal's trade or business, and the injured employee is a statutory employee of the principal.[10]

The Board finds that claimant, under the facts of this case, was a statutory employee of Smart on the date of the accident. The lease agreement between Oyerly and Smart serves as the fundamental premise for predicating liability pursuant to K.S.A. 44-503(a).[11] The work that was performed by the contractor, Oyerly and claimant, was an inherent and integral part of respondent Smart's principal trade or business. Further, the work being done by claimant is also ordinarily done by Smart's employees.[12] Consequently, the ALJ's Award of compensation against Smart and its insurance carrier is affirmed but for the foregoing reasons.

AWARD

WHEREFORE, it is the decision of the Board that the Nunc Pro Tunc and Award of Administrative Law Judge Brad E. Avery dated August 12, 2010, are modified to find claimant is a statutory employee of Smart Truck Line, Inc., but are otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Nathan D. Burghart, Attorney for Smart and its Insurance Carrier
Penny R. Moylan, Attorney for WCF
Brad E. Avery, Administrative Law Judge

[10] *Hanna v. CRA, Inc.*, 196 Kan. 156, 409 P.2d 786 (1966).

[11] See *Ellis v. Fairchild*, 221 Kan. 702, 562 P.2d 75 (1977).

[12] See *Woods v. Cessna Aircraft Co.*, 220 Kan. 479, 553 P.2d 900 (1976).